Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DWAYNE JAMES, JEWEL A. JAMES, a minor by next friend LOUISE KARTER, and LOUISE KARTER as Administratrix of the Estate of ROSA J. OWOLABI,

Petitioners,

v.

MAZDA MOTOR CORPORATION, MAZDA MOTOR OF AMERICA, INC., TOKAI RICA CO., LTD., and JOHN DOE,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are Petitioners' design defect claims against Respondents for failing to design a safe passive restraint system pre-empted by the Federal Motor Vehicle Safety Standards?

2. Are Petitioners' failure to warn claims against Respondents for failing to warn of the dangers of using the passive shoulder belt without the manual lap belt pre-empted by the Federal Motor Vehicle Safety Standards?

3. Can there be pre-emption when the manufacturer admits that their seat belt system poses a safety hazard?

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HONORABLE WILLIS B. HUNT, United States District Judge

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JEWEL A. JAMES, plaintiff

LOUISE KARTER, Administratrix of the Estate of ROSA J. OWOLABI, plaintiff

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The opinion of the United States Court of Appeals for the Eleventh Circuit is found at *James v. Mazda Motor Corporation*, 222 F.3d 1323 (11th Cir. 2000).

BASIS FOR JURISDICTION

Judgment was entered by the United States Court of Appeals for the Eleventh Circuit on August 18, 2000. Rehearing was denied on October 17, 2000.

Petitioners believe that jurisdiction is conferred upon the United States Supreme Court to review this matter pursuant to 28 U.S.C. § 1254(1) and Rule 10(a), Supreme Court Rules.

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The disposition of this case involves construction of the following statutes and regulations:

15 U.S.C. § 1392(d) (currently codified at 49 U.S.C. § 30103(b))

15 U.S.C. § 1397(k) (currently codified at 49 U.S.C. § 30103(e))

15 U.S.C. § 1411 (currently codified at 49 U.S.C. § 30117(c))

49 C.F.R. § 571.208 S4.1.2.1

49 C.F.R. § 573.5(a)

STATEMENT OF THE CASE

On February 16, 1995 plaintiffs' decedent, Rosa J. Owolabi, was involved in a fatal collision on Interstate 75 in Atlanta, Georgia when she was forced into another lane by an unknown driver causing her to crash into the median barrier at a mere **21 m.p.h.** The decedent was driving a 1994 Mazda Protegé manufactured by Respondent Mazda Motor Corporation, and sold and distributed in the United States by Respondent Mazda Motor of America, Inc. The belt system was manufactured by Respondent Tokai Rica, and installed in the vehicle by Respondent Mazda Motor Corporation.

The vehicle was equipped with a motorized shoulder belt and manual lap belt. For additional pelvic restraint the vehicle provided knee bolsters and anti-submarining seats. The vehicle **did not** contain an **airbag**. Petitioners' decedent was wearing her passive shoulder belt at the time of the collision, but she was not using her manual lap belt.

Petitioners' decedent bled to death from a severed spleen. Petitioners' expert, Dr. Joseph Burton, a forensic pathologist and biomechanic, opined that had Mrs. Owolabi been wearing a lap belt along with her shoulder belt, she should have survived this accident without serious injury.

This case was brought by the surviving heirs of Rosa J. Owolabi alleging her wrongful death. Petitioners' complaint alleges several distinct theories of liability against Mazda, arising in strict liability, negligence, and warranty. First, is a claim for failure to install an available airbag in the 1994 Mazda Protegé, which all parties agree

is pre-empted in light of this Court's recent ruling in *Geier v. Honda*, 529 U.S. 1913, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). (Petitioners' Complaint, ¶¶ 18, 29) A second claim is that the motorized shoulder belt and manual lap belt design employed in the 1994 Mazda Protegé was unsafe due to its specific design characteristics. (Petitioners' Complaint, ¶¶ 16, 19) This fact was admitted by Mazda. (Deposition of Muramoto, R-3-45, Exh. 2, pp. 45-46, 63-64, 78-79) Incorporated into the second claim is a third claim that Mazda had a duty to notify the consumer and to recall the seat belt system because of the known safety defects. (Petitioners' Complaint, ¶ 41) The final claim at issue is that Mazda failed to provide an adequate warning of the dangers of the passive shoulder belt being worn without the manual lap belt in place. (Petitioners' Complaint, ¶¶ 17, 28)

The respondents removed the case to the United States District Court for the Northern District of Georgia. The basis for jurisdiction for the United States District Court was diversity jurisdiction and amount in controversy pursuant to 28 U.S.C. § 1332.

During discovery, Mazda admitted its awareness of the dangers of wearing the shoulder belt without the lap belt in place. Hisao Muramoto, a design engineer at Mazda who designed this seat belt system, *repeatedly* acknowledged the dangerous condition of wearing the Mazda Protegé shoulder belt without using the lap belt in various accident scenarios.

Mr. Muramoto stated that the automotive industry generally recognizes that there is a danger of getting neck

injuries from submarining under the shoulder belt without the lap belt, and that these dangers differed with the type of accident, the size of the occupant, the knee bolster performance, and the characteristics of the individual shoulder belt. (R-3-45-Exh. 2, pp. 45-46) Later in the deposition, Mr. Muramoto was emphatic that the use of the Mazda lap belt is *essential*. (R-3-45-Exh. 2, pp. 63-64) Mr. Muramoto also admitted that the shoulder belt alone was not reasonably safe without using the manual lap belt. (R-3-45-Exh. 2, p. 78) Finally, Mr. Muramoto called the manual lap belt in the 1994 Mazda ***essential*** for safety reasons.

> . . . You instructed me to set aside the consideration to meet FMVSS requirements; however, if we are talking about the compliance with FMVSS 208, then we can satisfy those requirements without a lap belt put on; therefore, in that sense you can call that an optional. However, considering that in the real world there are various types of accidents and one trying to use all the restraint system equipped in the vehicle, **then the use of a lap belt is no longer optional but they are** *essential*.

(R-3-45-Exh. 2, p. 79) (Emphasis supplied). In other words, Mazda admits that they pass the crash test criteria, but in real world crashes the system is dangerous and defective in many crash situations.

Dennis Folds, a human factors engineer at Georgia Tech, opined that the warnings contained in the owner's manual and on the sun visor are insufficient for two reasons. The vehicle has a warning on the sun visor and in the owner's manual dealing with seat belt usage. The first allegation is that the warnings fail to adequately

convey to the consumer the dangers of the system when the lap belt is not in use. Second, the warning is not sufficiently conspicuous. While there are a number of warnings in the manual with the proper and universally recognized "WARNING" symbols, the lap belt warnings do not utilize these symbols.

On March 26, 1998, Respondents filed their Motion for Summary Judgment seeking to have all of Petitioners' claims pre-empted. Petitioners filed their Motion for Partial Summary Judgment on April 6, 1998 seeking a ruling that the seat belt system was defective per se due to Respondent's failure to recall a known safety defect.

On February 12, 1999 summary judgment was granted to all respondents by the District Court. The District Court found that Petitioners' claims were impliedly pre-empted by the Federal Motor Vehicle Safety Standards. Petitioners' Motion for Partial Summary Judgment was denied. A Final Judgment dismissing Petitioners' action and granting to Respondents Recovery of Costs from Petitioners was filed On February 12, 1999. (R-5-67-1) The Eleventh Circuit likewise found that Petitioners' claims were pre-empted based upon its prior holding in *Irving v. Mazda*, 136 F.3d 764 (11th Cir. 1998).

REASONS FOR GRANTING THE WRIT

Petitioners believe that the Writ should be granted in accordance with Rule 10(a), Supreme Court Rules, because the Eleventh Circuit has decided an important federal question on pre-emption that is in direct conflict with decisions of the Supreme Court of Texas, the

Supreme Court of Arizona, and the Sixth Circuit Court of Appeals. In addition, the decision of the Eleventh Circuit is in direct conflict with this Court's recent ruling in *Geier v. Honda*, 529 U.S. 1913, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000).

In *Hyundai Motor Company v. Alvarado*, 41 Tex. Sup. Ct. J. 947, 974 S.W.2d 1 (1998) the Supreme Court of Texas was asked to address the identical issue on both express and implied pre-emption with regards to a similarly designed seat belt system.[1] The Supreme Court of Texas ruled that the mere fact that automobile manufacturers were given a choice of designs of belt systems did not insulate them from common law liability for a poor design. They refused to find implied pre-emption.

Likewise, the Supreme Court of Arizona in *Hernandez-Gomez v. Volkswagen of America, Inc., et al.*, 185 Ariz. 509, 917 P.2d 238 (1996), noted that the manufacturers' options were defined in regards to performance criteria not design criteria. The Federal Motor Vehicle Safety Standards do not "mandate a particular design or any specific equipment." *Hernandez-Gomez, supra* at 185 Ariz. 516, 917 P.2d 245. Noting that the Safety Standards were merely minimum standards, they found no pre-emption of plaintiff's claims.

Finally, in a case that involved the identical basic seat belt design, the Sixth Circuit Court of Appeals found no

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[1] The Hyundai seat belt design employed a passive shoulder belt with knee bolsters and anti-submarining seats. It had no lap belt installed. Plaintiff contended that a lap belt should have been installed.

implied pre-emption of the design defect or warnings claims in *King v. Ford Motor Co.*, 209 F.3d 886 (6th Cir. 2000). Relying on *Collazo-Santiago v. Toyota Motor Corp.*, 957 F. Supp. 349 (D.P.R. 1997), the Court noted that "Compliance with performance criteria does not immunize manufacturers from common law liability arising from any defects in the production or design of their passive restraint systems." *King, supra* at 893.

The Eleventh Circuit ruled the exact opposite on Petitioners' claims in this case. Relying on their previous decision in *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998), they found that both Petitioners' design and warnings claims were impliedly pre-empted. The Eleventh Circuit refused to reconsider the *Irving* decision in light of the Supreme Court recent pronouncements in *Geier v. Honda*, 529 U.S. 1913, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000).

I. ARE PETITIONERS' DESIGN DEFECT CLAIMS AGAINST RESPONDENTS FOR FAILING TO DESIGN A SAFE PASSIVE RESTRAINT SYSTEM PRE-EMPTED?

Petitioners have maintained that *Irving v. Mazda, supra* was wrongly decided and that their claims are not pre-empted. They further believe that this Court's recent ruling in *Geier v. Honda*, 529 U.S. 1913, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) supports that position. The *Geier, supra* decision substantially undermined the holding in *Irving v. Mazda*, 136 F.3d 764 (11th Cir. 1998) on issues of pre-

emption. *Geier, supra* makes it clear that none of Petitioners' claims are pre-empted with the exception of the failure to install an airbag claim.

The Petitioners contend that the Mazda design of a manual lap belt and passive shoulder belt is inherently dangerous because of the dangers of the design when the manual lap belt is not worn. Petitioners produced testimony from Dr. Richard G. Snyder,[2] one of the early researchers on this subject, as well as former NHTSA engineer Billy S. Peterson, to the effect that a shoulder belt should never be worn without a lap belt. This is due to the inherent dangers of this configuration. There are a significant number of car crashes where this *half-passive* system has actually increased the severity of the injuries.[3]

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[2] Dr. Snyder authored numerous articles in the 1960s on seat belt designs, including, *Seat Belt Injuries in Impact*, Snyder, Richard G., Crosby, W.M., Young, J.W., Snow, C.C., and Hanson, P., University of Michigan, Ann Arbor: Highway Safety Research Institute (1967), and *Pathology of Trauma Attributed to Restraint Systems in Crash Impacts*, Snyder, Richard G., Snow, Clyde C., Young, Joseph W., Crosby , Warren W., Price, G. Townley. Federal Aviation Administration Office of Aviation Medicine, February 1969, p. 11.

[3] The NTSB concluded: "The potential dangers of dependence on only an upper torso restraint have been known to the medical profession for three decades. In the 1960s the 'diagonal' or shoulder belt was installed in several European automobiles. A Swedish doctor documented three cases of fatal neck injury (two decapitations) of occupants wearing the diagonal safety belt. . . . Occupants can submarine through the shoulder belt and suffer fatal injuries or can eject through the belt and suffer fatal neck injuries or can eject when the door opens and suffer fatal injuries." *NTSB Study on Special Investigations on Automatic Restraints On Passenger Vehicles*, Draft May 23, 1993, pp. 4-2 and 4-3. (R-3-44-Exh. C).

During discovery, Respondents admitted these dangers exist with their seat belt design. (See Deposition of Muramoto)

Rosa Owolabi was wearing the passive shoulder belt, but had not engaged her manual lap belt. Despite the low crash speed,[4] she died of internal injuries received because of the defective design of her restraint.

Petitioners do not contend that any particular type of passive restraint should have been installed by Mazda. Rather, they contend that the passive shoulder belt system as designed by Mazda is defective and dangerous when the manual lap belt is not used, because it provides insufficient pelvic restraint in certain crash situations which leads to an increased risk of serious injuries or death in low speed collisions. Further, they contend that the anti-submarining seats and knee bolsters do not sufficiently overcome the known dangers in the shoulder belt only system and that the Mazda system as designed could only be made safe when used in conjunction with a lap belt. As a safer alternative they propose a passive lap belt should be incorporated into the design to eliminate the dangers associated with non-use of the lap belt.[5]

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[4] Estimates of her change in velocity (Delta V) at the time of the collision ranged from 21 m.p.h. (Deposition of plaintiffs' expert Dr. Richard Bryan, p. 88, l.11) to 30 m.p.h. (Deposition of defendants' expert Terry Thomas, p. 29, l.5).

[5] Under Georgia law, petitioners were required to set out safer alternative designs available to the manufacturer. *See, Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994). The alternative passive designs suggested by petitioners included an airbag, a door-mounted three point passive restraint (found in most General Motors vehicles, and numerous other vehicles

Petitioners contend that this cause of action is one of those specifically preserved by the savings clause. Realizing that the Safety Standards are only minimum standards, Congress included the savings clause to encourage safety through common law tort actions. Only in situations where the tort action "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" should implied pre-emption be considered. *Geier, supra* at 1921. Rather than standing as an obstacle, this case is one of those cases where the "objective of Congress" is actually promoted by the tort action.

The Supreme Court in *Geier, supra* at 1926, placed weight on the Brief of the United States as Amicus Curiae presenting the Department of Transportation's interpretation of pre-emption. The "Brief of DOT" makes it clear that the phase in of passive restraint options was to encourage the development of new and improved technology. (*Geier, supra,* Brief of DOT, pp. 23-24; Brief of DOT, f.n.21)

> "[T]he Safety Act prohibits state legislatures and administrative agencies from adopting prescriptive safety standards that differ from a federal standard governing the same aspect of performance. It does not, however, necessarily preclude state courts from entering tort judgments that a vehicle was defectively designed with respect to that aspect of performance. This interpretation could create some tension within the

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at that time), and a motorized shoulder and motorized lap belt. Any one of these permissible passive designs would have solved the defect and saved Rosa Owolabi's life.

> Safety Act, because allowing manufacturers to be held liable for design defects in vehicles that comply with federal standards could run counter to Congress's interest in uniform performance standards. But any tension reflects a congressional compromise between the interests in uniformity and in permitting States to compensate accident victims, embodied both in the savings clause 15 U.S.C. § 1397(k) and in the definition of a federal standard as a "minimum standard" 15 U.S.C. § 1391(2)."

Geier, supra, Brief of DOT, pp. 14-15. The Secretary was emphatic that "state tort law does not conflict with a federal 'minimum standard' . . . merely because state law imposes a more stringent requirement." *Geier, supra,* Brief of DOT, p. 21.

The DOT, in its *Geier* brief, set out several examples of case scenarios that would *not be pre-empted.* Two of those examples are closely analogous to the case at bar. The first example involves 49 C.F.R. § 571.125 (Standard 125) regarding reflective warning devices. The DOT noted that the standard permits several design *options* that meet minimum safety standards.

> "Section 1397(k) [the savings clause] makes clear that compliance with Standard 125 is not a defense to a common law tort claim that the reflective device is defectively designed unless it uses one rather than another of those options. Thus, under our reading, Section 1397(k) has a sensible and important role."

(*Geier, supra,* Brief of DOT, p. 22) Thus, the Secretary states that a common law claim that one permissible design option is superior to another permissible design is

not pre-empted. Petitioners herein do not contend that any particular passive technology must be employed, but they contend that the design used by Mazda was a dangerous and defective design and that superior designs existed.

A second example given by the Secretary was under 49 C.F.R. § 571.105 (Standard 105). Standard 105 allows a manufacturer to meet safety standards by using air-brakes. However, this does not pre-empt a common law claim that the vehicle was defective without the addition of anti-lock brakes. *Geier, supra,* Brief of DOT, p. 21. Again, this example is directly on point in that Petitioner has suggested that the addition of a passive lap belt was a safer alternative to the manual lap belt, since it would increase the use rate of the lap belt portion of the system.

In comparing this case to the examples given by the DOT it is important to realize that, with regard to seat belt designs, NHTSA has never adopted or approved any particular design. The Secretary has always made it perfectly clear that NHTSA did not approve any particular design or type of passive restraint. Rather, they left the particular design options open to encourage improvements in safety performance.

> The automatic occupant protection provisions of FMVSS 208 do not specify that particular technologies, such as automatic belts or airbags, be used to comply with the standard. Rather, the standard requires a level of safety performance that can be met by any technology chosen by the manufacturer. Although safety belts and airbags are the most widely discussed

> technologies, the use of "passive interiors" as a means of compliance is also generating interest.

49 FR 28965. Thus, the Mazda design was not approved or disapproved by NHTSA. Mazda was required to design a restraint that was safe and effective that would be passive and meet certain crash performance criteria. NHTSA took no part in determining what type of restraint should be employed.

The Supreme Court in *Geier, supra* at 1924, stated that one of the goals of the 208 passive restraint requirements was to obtain a mixed fleet, with airbags and various passive belts options. The Court found pre-emption *only* because the failure to install an airbag would frustrate this goal and force an all airbag fleet. It would force the manufacturers to "install airbags rather than other passive restraint systems, such as automatic belts or passive interiors." *Geier, supra* at 1925.

Petitioners' claims in this case would have a different effect. Their claims would force the manufacturers to design a *safer passive restraint* than the one in the 1994 Mazda Protegé. Petitioners' lawsuit seeks to improve the safety performance of the Mazda seat belt system, whether by a three point door mounted passive belt, a motorized shoulder belt with a motorized lap belt, a beltless passive interior design, or even a motorized shoulder belt with knee bolsters that overcome the inherent dangers of the shoulder belt only system.

The purpose of the standard was to obtain a mix of passive devices that "would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production

costs associated with airbags, and would facilitate the development of alternative, cheaper, and *safer* passive restraint systems." *Geier, supra* at 1924. (Emphasis supplied) Petitioners' claims are perfectly consistent with "the development of alternative, cheaper, and *safer* passive restraint systems." Petitioners merely seek a safer design than the one in the 1994 Mazda Protegé.

In reality it is *pre-emption* that is a threat to achieving the development of DOT's goals. " . . . [T]he savings clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which **juries not only create, but also enforce, safety standards**, while simultaneously providing necessary compensation to victims." *Geier, supra* at 1920 (emphasis supplied). The lawsuit before the Court is one of those cases specifically contemplated under the savings clause to enforce and *improve* the safety of vehicles. Thus, Petitioners' design defect claims should not have been dismissed as being pre-empted.

II. ARE PETITIONERS' FAILURE TO WARN CLAIMS PRE-EMPTED BY THE FEDERAL MOTOR VEHICLE SAFETY STANDARDS?

The recent holding in *Geier v. Honda*, 529 U.S. 1913, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) reiterates the need to make a case specific analysis as to each of petitioners' claims, including an independent analysis of the warnings claim separate from the design defect claims. The Court of Appeals dismissed Petitioners' warnings claims as being pre-empted based upon the ruling in *Irving v. Mazda*, 136 F.3d 764 (11th Cir. 1998). However, the *Irving*

Court never made the traditional pre-emption analysis as it related to the warnings claims. Because there are absolutely no warnings requirements in the Federal Motor Vehicle Safety Standards, the warnings claim is clearly not pre-empted. If the court had done the required analysis, they would have concluded that the failure to warn claim was not pre-empted.

A. Failure To Separately Analyze Warnings Claims

Georgia law is clear that failure to warn is a distinct cause of action, separate and apart from the design defect claims. *Chrysler Corp. v. Batten*, 264 Ga. 723, 450 S.E.2d 208 (1994) (holding that sale of the defective product and the failure to warn are separate and distinct causes of action). *See also, Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984) (Manufacturer could be held liable for both the design defect and the failure to warn of the foreseeable dangers inherent in the design); *Daniels v. Bucyrus-Erie Corp.*, 237 Ga. App. 828, 516 S.E.2d 848 (1999) (design defect claims and failure to warn claims are treated differently).

In this case, Petitioners have alleged separate and distinct claims in their complaint for the design defect and the warnings defect. Petitioners allege two different defects with regards to the warnings. First, they claim the wording of the Mazda warning is insufficient to adequately warn of the serious and life threatening dangers of the passive shoulder belt being worn without the manual lap belt in place. Second, Petitioners allege that the Mazda warning was not sufficiently conspicuous in its

placement in the vehicle as well as the lack of bolding in the owner's manual by use of proper warning symbols.

Relying on *Irving v. Mazda*, 136 F.3d 764 at 769-770 (11th Cir. 1998), the district court dismissed plaintiffs' warnings claims. The Eleventh Circuit likewise found that *Irving, supra* was on point and that all of their claims should be dismissed, including the warnings claims. No separate analysis was ever made of the Petitioners' warning claims.

The flaw in the *Irving* decision is that it failed to make a separate pre-emption analysis required by *Geier v. Honda*, 529 U.S. 1913, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) with regards to the warning claim. After going through a detailed pre-emption analysis with regards to the design defect claim, the *Irving* Court incorrectly concluded that the design defect claims were pre-empted. However, instead of doing the same analysis for the warnings claim, the *Irving* Court merely stated, "Because Petitioner's defective-design claim is preempted by FMVSS 208, there was no defect about which to warn." Petitioners contend that the Court should have made the same analysis for every claim, including the warnings claims.

Geier, supra reiterated that the reviewing court must make a very narrow and precise focus of what the plaintiffs' claims seek to accomplish, and whether each claim "under the circumstances of the particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Geier, supra* at 1920.

This concept of making a detailed and fact specific analysis as to each claim is nothing new. In just the past decade, the Supreme Court has done this on three occasions, resulting in dismissal of some claims while preserving others. "An actual conflict analysis should be narrow and precise, 'to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.' " *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 515, 109 S.Ct. 1262, 1277, 103 L.Ed.2d 509 (1989). See, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (The Court examined separately state law damages claims for express warranty, fraud and conspiracy, and warnings); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) (The Court found the excessive speed claim was pre-empted but the warning device claim was not); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (The warnings claims should not have been pre-empted).

B. The Pre-Emption Analysis

The implied pre-emption analysis that the Eleventh Circuit should have made was specifically outlined in *Freightliner v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

> "We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,' (cits. omitted) or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "

Freightliner Corp. v. Myrick, supra, 514 U.S. 280, 115 S.Ct. at 1487. First, the Court must determine do petitioners' warnings claims make it "not possible for [Mazda] to comply with both federal and state law . . . ?" *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S.Ct. 1483, 1488 (1995). Second, do the warnings claims "frustrate 'the accomplishment and execution of the full purposes and objectives of Congress?' " *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S.Ct. 1483, 1488 (1995).

1. First Prong

First, do plaintiffs' warnings claims make it impossible for Mazda to comply with both federal and state law? *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S.Ct. 1483, 1488 (1995). Clearly, the answer is "no". The only mention of warnings in the regulations is the requirement in FMVSS 208 S7.3 (49 C.F.R. § 571.208 S7.3) of a 4-8 second chime. The regulations are silent as to any regulations as far as written warnings for passive belts. Thus, the warnings claims by Petitioners cannot conflict with regulations that do not exist.

It is noteworthy that NHTSA has chosen to require certain warnings language in other areas. The NHTSA adopted specific sun visor airbag warning language that must accompany all cars equipped with an airbag. FMVSS 208 S4.5.1(b), 49 C.F.R. § 571.208 S4.5.1(b). *See, Fisher v. Ford Motor Company,* 224 F.3d 570 (6th Cir. 2000). (The warnings claims were pre-empted because plaintiff sought to require the manufacturer to add language on

the sun visor that was different than the exclusive language adopted by NHTSA.) However, NHTSA has never adopted such regulations with regards to passive belts.

2. Second Prong

It is equally clear that the second prong of the implied pre-emption analysis dictated by *Freightliner* in this case leads to the conclusion that the Petitioners' claims are not pre-empted. Does the lawsuit "frustrate" the accomplishment and execution of the full purposes and objectives of Congress? Again, the answer is "no". Instead, plaintiffs' warnings claims promote the objectives of Congress.

The objectives of Congress under the Safety Act were to *provide safer cars, reduce injuries and save lives* in automobile accidents. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 1485 (1995). *See also, Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992). While Federal Motor Vehicle Safety Standard 208 does not specify any particular design of automatic belt, it does make it clear that the purpose of the regulations is to provide a reasonable degree of occupant protection in foreseeable crash situations. Standard 208 S2 states in pertinent part:

> *Purpose*. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements. . . .

49 C.F.R. § 571.208 S2.

Petitioners in this case have alleged that Mazda knew there was a danger in wearing the shoulder belt without

the lap belt which would actually increase the risk of serious injury or death in low speed crashes, such as the one that killed Rosa Owolabi. Mazda has admitted this through Mr. Muramoto.

Only in situations where the tort action "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" should implied pre-emption be considered. *Geier, supra* at 1920. Rather than standing as an obstacle, the warnings claims would serve to improve the performance of the safety restraint system by encouraging use of the manual lap belt. *See generally, King v. Ford Motor Co.*, 209 F.3d 886 (6th Cir. 2000) (warnings claims not pre-empted in passive belt case).

C. The DOT Interpretation

The Supreme Court in *Geier, supra* at 1925, placed weight on the Brief of the United States as Amicus Curiae presenting the Department of Transportation's interpretation of pre-emption. The "Brief of DOT" makes it clear that the phase in of passive restraint options was to encourage the improvement of new and improved technology. (*Geier, supra*, Brief of DOT, pp. 23-24; Brief of DOT, f.n.21) The Secretary in his brief went on to say:

> In cases in which tort liability does not conflict with a federal standard, Section 1397(k) makes it clear that compliance with the standard does not immunize a manufacturer from liability. Those cases can arise frequently, since state tort law does not conflict with a federal "minimum standard" (15 U.S.C. § 1391(2))

> merely because state law imposes a more stringent requirement.

(*Geier, supra,* Brief of DOT, p. 21).

Would Petitioners' warnings claims frustrate the purpose of improving safety restraint technology? Certainly not. By Mazda's own admissions, they would improve the performance of the Mazda belt in real world crash situations.

A search of the NHTSA interpretive files shows that the agency has previously been asked to address an almost identical claim. In a letter dated August 7, 1996, Chief Counsel Samuel J. Dubbin was asked about warnings requirements for a motorized passive belt system with a manual lap belt. Dubbin concluded that FMVSS did not prohibit **"a sun visor warning . . . which would employ colors and signal words and would communicate the nature of the hazard and potential consequences associated with not wearing the lap belts,"** provided the vehicle was not equipped with an airbag. (Note: the vehicle in this case was not equipped with an airbag and thus this interpretation would apply to the case *sub judice.*)

"When a court reviews an agency's construction of the statute which it administers, . . . great deference is given to an agency's interpretation of the statute it is charged to administer." *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Because the Eleventh Circuit's holding in this case as well as the holding in *Irving, supra* clearly conflict with NHTSA's interpretation of FMVSS 208, this Court should grant certiorari and reverse the holding as it relates to warnings claims.

III. CAN THERE BE PRE-EMPTION WHEN THE MANUFACTURER ADMITS THAT THE SEAT BELT SYSTEM POSES A SAFETY HAZARD?

Finally, Petitioners contend that it was never Congress' intent to insulate a manufacturer from liability for an admittedly dangerous product merely because it meets a minimum safety standard. Despite raising this below, the Eleventh Circuit never addressed this issue. Petitioners believe that Mazda's admission of a design defect is important in the pre-emption analysis. Since the goal of Congress was to save lives and promote safety, it is unimaginable that Congress envisioned a system where a manufacturer could sell an admittedly dangerous vehicle and hide behind the doctrine of pre-emption.

Hisao Muramoto, a design engineer at Mazda who designed this seat belt system, *repeatedly* acknowledged the dangerous condition of wearing the Mazda Protegé shoulder belt without using the lap belt in various accident scenarios, calling the lap belt "essential" for safety reasons. Mazda admits that they pass the crash test criteria, but in real world crashes the system is dangerous and defective in many crash situations.

The Secretary of DOT did not intend to allow a knowingly dangerous design just because the design can pass minimum crash performance criteria. In fact, both Congress and the Secretary had expressed a contrary intent. Both 15 U.S.C. § 1411 and 49 C.F.R. § 573.5 place an affirmative duty on the manufacturer to notify each owner, the dealers, as well as the NHTSA of any safety related defect, and to recall any product where "a manufacturer – (1) obtains knowledge that any motor vehicle

or item of replacement equipment manufactured by him contains a defect and determines in good faith that such defect relates to motor vehicle safety. . . . " 15 U.S.C. § 1411.

The Act requires notification and recall under two separate and distinct circumstances. The first condition is if a manufacturer determines that there is a defect that relates to motor vehicle safety, and the second is if the manufacturer determines that the vehicle does not comply with Safety Standards. **Thus, Congress and the NHTSA contemplated that a vehicle can pass "minimum" safety standards and still be defective.** A recall is mandated in either event.

Even assuming plaintiffs' general design defect claims are pre-empted, their claims that the specific Mazda design is dangerous are not pre-empted. The Supreme Court in *Geier, supra* at 1928, acknowledged that even in situations where failure to install airbag claims might be pre-empted, special design considerations might "escape pre-emption." Similarly, where a manufacturer has acknowledged the dangerousness of its own design, there would be no pre-emption, even if pre-emption might otherwise exist. Mazda is in essence admitting that there are special design considerations that would preclude them from using the belt type that they have chosen.

The NHTSA explained the relationship between the pre-emption clause and the savings clause as follows:

> Congress provided that mandatory federal safety standards are only "minimum standard[s]," 15 U.S.C. § 1391(2), and it interposed

> no barrier to manufacturers exceeding those standards voluntarily, either nationwide or in particular States. . . . Congress . . . decided to tolerate [the tension between Federal regulations and common law causes of action], in a compromise between the federal interest in uniformity and the States' traditional interest in compensating victims of motor vehicle accidents, an area in which the States have long measured defendants' conduct against standards of care articulated in the common law adjudication of tort claims."

Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S.Ct. 1483, 1488 (1995), Brief for the United States as Amicus Curiae supporting Respondents, pp. 17-18. The case *sub judice* presents the perfect example of why Congress intended that common law liability remain intact. The Mazda passive system can pass the crash tests and yet still provide a very dangerous situation for occupants in low speed collisions because it provides inadequate pelvic restraint. Clearly, this lawsuit does not frustrate the intent of Congress or the regulations! **This lawsuit actually promotes the intent of Congress and NHTSA.**

The lower Court's finding of pre-emption and the refusal to address this issue would allow Respondents to **insulate themselves** from liability based upon the manufacturer's choice of seat belt designs, despite the safer alternatives available to them. This insulation from common law liability is clearly not the intent of the savings clause or the Federal Motor Vehicle Safety Standards. As this Court stated in *Medtronic, Inc. v. Lohr*,

> Medtronic's argument is not only unpersuasive, it is implausible. Under Medtronic's view

> of the statute, Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 116 S.Ct. 2240 at 2251 (1996). Likewise, Mazda has asked the courts to preclude the state courts from affording consumers any protection from injuries from an admittedly defective seat belt system, and so far the Courts have obliged.

CONCLUSION

For the reasons set forth above, Petitioners ask this Court to grant certiorari on these important questions on pre-emption.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8310

DWAYNE JAMES,
JEWELL A. JAMES,
LOUISE KARTER,

Plaintiffs-Appellants,

versus

MAZDA MOTOR CORPORATION,
POPE CHEVROLET, INC.,
TOKAI RICA CO., LTD.,
JOHN DOE,
MAZDA MOTOR OF AMERICA, INC.

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

Aug. 18, 2000.

Before: TJOFLAT, MARCUS and KRAVITCH, Circuit Judges.

TJOFLAT, Circuit Judge:

The sole issue presented in this appeal is whether the Supreme Court's decision in *Geier v. American Honda Motor co., Inc.*, ___ U.S. ___, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), casts doubt on the viability of this circuit's decision in *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th

Cir.), *cert. denied*, 525 U.s. 1018, 119 S.Ct. 544, 142 L.Ed.2d 452, (1998). We hold that *Irving* is still good law.

I.

A.

Plaintiffs' decedent, Rosa J. Owolabi, was killed on February 16, 1995, when the car she was driving was forced off Interstate 75 in Atlanta, Georgia, by an unidentified driver,[1] and crashed into the freeway median. Owolabi's car was a 1994 Mazda Protege, manufactured by defendant Mazda Motor Corporation, and distributed in the United States by defendant Mazda Motor of America (collectively "Mazda").[2] The 1994 Protege employed a passive (automatic) two-point shoulder belt, and a manual lap belt.[3] Owolabi was not wearing her lap belt at the time of the accident.

B.

This wrongful death action began in the Superior Court of Fulton county, Georgia;[4] Mazda removed it to

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[1] Plaintiffs named the unidentified driver, "John Doe," as a defendant and asserted a negligence claim against "him." John Doe has never been identified, has never been served with process, and has not made an appearance in this lawsuit.

[2] Plaintiffs also named as defendant Tokai Rica co., which manufactured the seat belt system used in the 1994 Protege. For simplicity, we include Tokai Rica within the term "Mazda".

[3] The 1994 Protege did not have an airbag.

[4] See Ga.Code Ann. § 51-4-2(a) (1999) ("The surviving spouse or, if there is no surviving spouse, a child or children,

the district court following the service of process. The plaintiffs' complaint contained five counts. Each count alleged that the 1994 Protege's manual lap belt had been defectively designed and that Mazda had negligently failed to warn consumers that the Protege was dangerous unless the manual lap belt was worn, and sought compensatory and punitive damages on a different theory of recovery.[5] Count one was based on strict tort liability; count two on negligence; count three on breach of an express warranty; count four on breach of an implied warranty of fitness; and count five, a second negligence theory, on breach of a duty to notify consumers of the Protege's defect.

After the parties joined issue, Mazda moved for summary judgment, claiming that plaintiffs' common law actions were preempted by Federal Motor Vehicle Safety Standard ("FMVSS") 208, 49 C.F.R. § 571.208 (1999) (enacted under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, originally 15 U.S.C. § 1381 et seq. (1988 ed.), now codified as amended at 49

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either minor or suit juris, may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence."); id § 51-4-5(b) ("[T]he personal representative of the deceased person shall be entitled to recover for the funeral, medical, and other necessary expenses resulting from the injury and death of the deceased person."). The plaintiffs are Owolabi's children, Dwayne and Jewel James, and the administratrix of Owolabi's estate, Louise Carter.

[5] the complaint also presented a sixth "count," for punitive damages. That count did not, however, assert a separate theory of liability; it simply incorporated the first five counts of the complaint.

U.S.C. §§ 30101-30169 (1994 & Supp. II 1998)). The district court granted Mazda's motion.[6] We affirm.

II.

A.

In *Irving v. Mazda Motor corp*, 136 F.3d 764 (11th Cir.1998), we encountered the theories of recovery the complaint presents in this case. The facts in *Irving* were that

> [p]laintiff Juliette Irving filed suit against Defendant Mazda Motor Corporation on behalf of her daughter, Bonita Irving. bonita was killed in a single-car accident while driving a 1990 Mazda MX-6. After her daughter's death, Plaintiff filed this suit claiming that the seat belts in the MX-6 were defectively designed and that Mazda failed to warn consumers adequately of the risks of not utilizing all portions – particularly the manual lap belt portion – of the safety belt system.

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[6] In its order granting Mazda summary judgment, the district court did not specifically discuss the pending negligence claim against John Doe, *see supra* n. 1, nor had the court previously dismissed John Doe pursuant to Fed.R.Civ.P. 4(m) ("If service . . . is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant. . . . "). since it is clear that John Doe was never in any sense "before the court," we do not consider his claim still pending for purposes of the final judgment rule, 28 U.S.C. § 1291 (1994); we construe the court's order granting defendants summary judgment to have disposed of plaintiffs' claim against him without prejudice.

> The safety belt system used in the Mazda MX-6 included a two-point passive shoulder restraint (automatic shoulder belt) with a manual lap belt. This kind of restraint system was one of three options provided to car manufacturers by FMVSS 208. Plaintiff contends the design represented by this option was defective.

We concluded under those facts that (1) Irving's common law "defective-design claim is not expressly preempted by [FMVSS 208]," id. at 768; (2) Irving's "suit against Defendants for their exercise of an option provided to Defendants by FMVSS 208 conflicts with federal law and, thus, is [impliedly] preempted," id. at 769; and (3) Irving's "failure-to-warn claim – which is, in this case, dependent on the preempted defective-design claim – was properly dismissed [because it is also preempted]," id. at 770.

In this case, the district court concluded, in its order granting Mazda summary judgment, that the passive two-point shoulder belt and manual lap belt in the 1994 Protege (which was a similar system to the one used in the 1990 Mazda MX-6) complied with FMVSS 208. As a result, the court found the present case "virtually indistinguishable" from *Irving*, and on that basis granted Mazda summary judgment.

As an initial matter, we find no error in the court's conclusion that the passive two-point shoulder belt and manual lap belt complied with FMVSS 208.[7] Moreover,

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[7] Referring to the plaintiff's negligent failure to warn claim, the district court, in its order granting Mazda's motion for summary judgment, said this: "Plaintiffs do not allege that the

we agree with the district court that this case is on all fours with *Irving*.[8] If *Irving* is still good law, plaintiffs' appeal fails. Our only task on appeal, therefore, is to determine if *Irving* is good law. We conclude that it is.

B.

First, plaintiffs argue that *Irving* was not good law when it was decided, because it conflicted with prior circuit precedent, namely *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir.1994), aff'd 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), and *Doyle v. Volkswagenwerk Aktiengelellschaft*, 114 F.3d 1134 (11th Cir.1997) (*Doyle II*). See *Cohen v. Office Depot, Inc.* 204 F.3d 1069, 1072 (11th Cir.2000) ("[W]here two prior panel decisions conflict we are bound to follow the oldest one."). Second, plaintiffs argue that the Supreme Court's decision in *Geier*, 120 s.Ct. 1913, abrogates *Irving's* implied preemption analysis. we consider these two arguments in order.

1.

Plaintiffs argue that the *Irving* court's analysis of implied preemption was incorrect because it conflicted with *Myrick v. Freuhauf Corp.*, 13 F.3d 1516. In *Myrick*, 13

Protege failed to comply with federal law requirements for warning label placement regarding proper seat belt use."

[8] The district court held that all of the claims contained in the five counts of plaintiffs' complaint stand or fall on proof that the Protege's safety belt system was defective in the first instance. We agree: if plaintiffs' defective design claim is preempted, so too are these claims.

F.3d at 1518, we concluded that "a common law tort for failure to install antilock brakes in a tractor-trailer is [not] preempted by the National Traffic and Motor Vehicle Safety Act." In doing so we held that "where . . . there is an express preemption provision, which constitutes a reliable indicium of congressional intent, implied pre-emption analysis has no place." Id. at 1523. On writ of certiorari, the Supreme Court affirmed the judgment, but disagreed with the reasoning; it found our implied preemption analysis "without merit." *Freightliner Corp. v. Myrick*, 514 U.S. at 287, 115 s.Ct. at 1487. The *Irving* court recognized this. In its discussion of implied preemption it noted that when "the Supreme Court reviewed *Myrick* on appeal . . . [it] affirm[ed] the outcome, [but] stressed that implied preemption is possible despite the presence of an express preemption clause." *Irving*, 136 F.3d at 767 n. 1. In other words, the *Irving* court engaged in the correct preemption analysis.

As a second argument, plaintiffs contend that *Doyle II*, 114 F.3d 1134, conflicts with *Irving*. This is not correct. In *Doyle II*, plaintiff was injured while driving a 1989 Volkswagen Jetta, which had a passive shoulder belt but no lap belt. The district court granted defendant Volkswagenwerk Aktiengelellschaft (which manufactured the 1989 Jetta) summary judgment on the ground that the Jetta "complied with the applicable federal standards, notwithstanding the absence of a lap belt" and that "Georgia law . . . does not hold automobile manufacturers to a higher standard than federal requirement." Id. at 1135. The only question on appeal, therefore, was whether this was a correct statement of Georgia law (based on a certified question to the Georgia Supreme

Court, *see Doyle v. Volkswagenwerk Aktiengelellschaft*, 81 F.3d 139 (11th Cir. 1996) (*Doyle I*), we concluded that it was not). Since "the district court found it unnecessary to reach the preemption issue," we did not consider preemption. *Doyle II*, 114 F.3d at 1135.[9] *Doyle II*, therefore, left open the question that we decided in *Irving*.

2.

Since the district court's grant of summary judgment, the Supreme Court has decided *Geier v. American Honda Motor Co.*, ___ U.S. ___, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). *Geier* is a so-called "no airbag case" in which the plaintiff sued an automobile manufacturer for failure to install an airbag. The Supreme Court held that this claim is not expressly preempted by FMVSS 208, but is impliedly preempted by FMVSS 208 because a common law action based on the failure to install an airbag "actually conflicts with FMVSS 208." Id. 120 S.Ct. at 1922. In supplemental briefing to this court, plaintiffs argue that "*Geier* substantially undermines the holding in *Irving* . . . on issues of preemption."

We are not sure that plaintiffs have read the same *Geier* opinion that we have read. The Supreme Court made clear that, despite a savings clause in the National

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[9] On remand, the district court found that Doyle's claims were preempted. *Doyle v. Volkswagenwerk Aktiengesellschaft*, No. 91-CV-1296A-JEC (N.D. Ga. Sept. 29, 1999). The parties appealed to this court, and on June 30, 2000, we granted the parties' joint motion to dismiss the appeal with prejudice. *Doyle v. Volkswagenwerk Aktiengesellschaft*, No. 98-9453 (11th Cir. June 30, 2000) (unpublished).

Traffic and Motor Safety Act, 15 U.S.C. § 1397(k) (1988 ed.) (now codified at 49 U.S.C. § 30103(e) (1994)), courts should apply normal implied preemption principles to determine if a state common law action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. 120 S.Ct. at 1921 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)). This is exactly the analysis used by the *Irving* court:

> The existence of an express preemption clause does not necessarily preclude the presence of implied preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-90, 115 S.Ct. 1483, 1487-88, 131 L.Ed.2d 385 (1995). Thus, if Plaintiff's state law claim conflicts with FMVSS 208 or if her claim would hinder Congress's objectives in passing the Act, the state law will be preempted.

Irving, 136 F.3d at 768. Since *Irving* is not in conflict with *Geier*, or any of our previous decisions, we are bound to follow it. The district court, therefore, correctly granted Mazda summary judgment.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DWAYNE JAMES, JEWEL A. JAMES, a minor by next friend LOUISE KARTER, and LOUISE KARTER as Administratrix of the Estate of ROSA J. OWOLABI, Plaintiff vs. MAZDA MOTOR CORPORATION MAZDA MOTOR OF AMERICA, INC. POPE CHEVROLET, INC., TOKAI RICA CO., LTD., and JOHN DOE, Defendants	CIVIL ACTION FILE NO. 1:96-CV-2356-WBH

ORDER

Before the Court are defendants' Motion for Summary Judgment [39-1] and plaintiffs' Motion for Partial Summary Judgment [44-1]. Plaintiff Dwayne James and Louise Karter brought this suit on behalf of decedent Rosa J. Owolabi, who was killed in an automobile accident, alleging that the restraint system in the 1994 Mazda Protege that Owolabi was driving at the time of her accident was defectively designed and that defendants failure to warn of the dangers associated therewith. For the reasons discussed below, the Court grants defendants' motion for summary judgment.

I. BACKGROUND

On February 16, 1995, Owolabi was killed in a car accident while driving her 1994 Mazda Protege along Interstate 75 in Atlanta, Georgia. The safety features used in her car included a two-point passive-restraint shoulder belt, knee bolsters, and a manual lap belt. Defendant Tokai Rica Company, Ltd. manufactured the safety belts used in the car. At the time of the accident, Owolabi was wearing the passive-restraint shoulder belt, which automatically comes across the driver's shoulders and chest when the driver's door is closed, but not the manual lap belt. Plaintiffs allege that had Owolabi also been wearing the lap belt, she would have survived the accident.

II. DISCUSSION

Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act") for the purpose of reducing fatalities and injuries caused by traffic accident.[1] 49 U.S.C. § 30101. Congress gave the Secretary of Transportation authority to promulgate motor vehicle standards that are "practicable [and] meet the need for motor vehicle safety." § 30111(a). The Secretary delegated this authority to the National Highway Transportation Safety Administration ("NHTSA"), 49 C.F.R. § 501.2, which promulgated the Federal Motor Vehicle Safety Standards ("FMVSS"), 49 C.F.R. § 571 *et seq.* Defendants contend that the Protege's restraint system fully

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[1] The Safety Act was recodified from Title 15 to Title 49 of the United States Code in 1994.

complies with all federal safety standards and that plaintiffs' claims are preempted as a result.

A. Preemption

Federal law may preempt state law expressly, impliedly, or through field preemption whereby federal laws or regulations so extensively regulate a particular area that it is clear that Congress intended to control the subject in its entirety. *See Cipollone v. Ligget Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992). Defendants argue that in the instant case, state law is impliedly preempted.

The substantive facts and allegations in the case at bar are virtually indistinguishable from those in *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 768 (11th Cir.), *cert. denied*, 119 S.Ct. 544 (1998). In that case, the driver of a 1990 Mazda MX-6 was killed in a car accident and, as here, the vehicle was equipped with an automatic two-point shoulder belt and a manual lap belt. *Id* at 766. There, the decedent's mother brought suit against Mazda, claiming that the restraint system was defectively designed and that Mazda failed to warn consumers of the dangers associated with wearing the shoulder belt without the lap belt. *Id*. The Eleventh Circuit held that "common law claims that two-point passive shoulder belts, paired with manual lap belts, constitute inherently a design defect" were impliedly preempted by a provision of FMVSS 208[2] not applicable to this case.

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[2] FMVSS 208 and its various subsections are found at 49 C.F.R. § 571.208.

Plaintiffs argue that *Irving* is wrongly decided and that, regardless, under *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981), prior case law directly at odds with it controls until overruled by an *en banc* decision. While plaintiffs cite a correct rule of law regarding precedent, in this case, the United States Supreme Court expressly rejected the reasoning upon which the earlier decision rested. In *Myrick v. Freuhauf*, 13 F.3d 1516 (11th Cir. 1994), the Eleventh Circuit held that because the Safety Act expressly preempted some but not all common law claims,[3] a court is foreclosed from finding that congress also intended implied preemption. *Id* at 1521. On appeal, the Supreme Court found the Eleventh Circuit's reasoning that implied preemption is precluded where an express exemption clause exists to be "without merit." In *Freightliner corp. v. Myrick*, 514 U.S. 280, 287-88, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). Thus, this Court is bound by *Irving*; should the court find that defendants have complied with federal regulations, plaintiffs' design defect claim is preempted. Although the Mazda in *Irving* utilized a safety system identical to the one at issue here, because it was manufactured under a subsection of FMVSS 208 not applicable to this case, *Irving* does not automatically preclude plaintiffs' claim. In fact, plaintiffs

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[3] The Safety Act expressly preempts any state laws regarding "motor vehicle safety standard[s]" except where a "standard is identical to the standard prescribed under this chapter." 49 U.S.C. § 30103(b)(1). However, the Safety Act also contains a savings clause, providing that "compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." *Id* at § 30103(e).

argue that the Protege does not comply with either the Safety act or the federal safety standards, and, as such, their claim cannot be preempted. Therefore, the Court must next examine whether the Protege safety system satisfies federal law.

B. Compliance with Federal Laws and Regulations

1. The Safety Act.

Plaintiffs first argue that the Protege's automatic shoulder harness and manual lap belt configuration is not a "belt system" as that term was defined in the 1974 version of the Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1394, et seq. Under § 1410(b)(2)(B), NHTSA was prohibited from promulgating any motor vehicle safety standard that permitted manufacturers to comply "by means of an occupant restraint system other than a belt system." A belt system was defined in § 1410(f)(2) as "an occupant restraint system consisting of integrated lap and shoulder belts. . . . " Plaintiffs are correct that the Protege's non-integrated shoulder and lap belt configuration does not qualify as a belt system under § 1410(f)(2); however, it does not follow that the Protege's system is therefore in violation of the Safety Act. § 1410(b)(3)(B) furnishes relief from the § 1410(b)(2) belt system requirement by providing that the requirement "shall not apply to a Federal motor vehicle standard which the Secretary elects to promulgate in accordance with the procedure specified in subsection (c) of this section. . . . " As discussed below, the Secretary of Transportation exercised this right and permitted manufacturers to design and install automatic belt systems that deviate from

§ 1410(b)(2). Thus, as long as the Protege's safety configuration was constructed in accordance with the appropriate procedures, the mere fact that the belt configuration is not a belt system under § 1410 does not prevent it from complying with the Safety Act. To determine if the Protege is legitimately exempt, the Court must examine whether it conforms to the FMVSS.

2. Federal Motor Vehicle Standards.

Plaintiffs argue that defendants' two-point automatic shoulder harness and manual lap belt system does not comply with FMVSS 208 S4.1.4. After conducting an extensive review of the applicable standards, relevant case law, and the informal opinions of the NHTSA, the Court disagrees. The 1994 Mazda Protege at issue here was manufactured on or after September 1, 1989, but before September 1, 1996, and, pursuant to FMVSS 208 S4.1.4, its restraint system must comply with the requirements of FMVSS 208 S4.1.2.1. This provision provides, in relevant part, that the front seats of a passenger car must not only meet the appropriate frontal crash protection requirements but must also

> (c) Either. (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or
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> (2) at each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or

> Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

FMVSS 208 S4.1.2.1 (a)-(c).

By providing an automatic belt, as allowed under FMVSS 208 S4.5.3, Mazda chose to comply with subsection (c)(2). FMVSS 208 S4.5.3 allows manufacturers to substitute an automatic belt system in lieu of the seat belt assembly otherwise required by FMVSS 208 S4.1.2.1(c)(2):

> *Automatic Belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option.

FMVSS 208 S4.5.3. Plaintiffs contend that the Protege's automatic shoulder harness, knee bolsters, and manual lap belt restraint system does not constitute a seat belt assembly and thus fails to meet S4.5.3, and consequently S4.1.2.1(c)(2). Defendants disagree and argue that, even discounting the manual lap belt, the passive shoulder restraint and knee bolster configuration satisfies FMVSS demands.

a. Is the Protege configuration an automatic seat belt assembly?

Plaintiffs initially argue that the Protege's restraint system is not a "seat belt assembly that requires no action

by the occupants," as required by S4.5.3, because it provides insufficient restraint "in the real world" unless the occupant engages the manual lap belt. Regardless, however, of any real world inadequacies inherent in the Protege safety configuration, if Mazda complied with federal regulations, a design defect claim is preempted. S4.5.3 requires that the system "meet the crash protection requirements of any option under S4" and, in this case, specifically the requirements of S4.1.2.1. Plaintiffs do not present evidence suggesting the Protege's automatic shoulder belt and knee bolster system fails to satisfy these requirements,[4] and, consequently, no support exists for finding that the shoulder harness is not an automatic belt under S4.5.3.

Plaintiffs next argue that the shoulder belt – knee bolster configuration cannot be an automatic belt assembly because it does not provide pelvic support. Pursuant to S4.5.3., the car manufacturer must provide a "seat belt assembly" that requires no action by the occupants. And, under FMVSS 209[5], a seat belt assembly is defined as "any strap, webbing, or similar device designed to secure a person in a motor vehicle in order to mitigate the results of any accident." FMVSS 209 S3. Plaintiffs do not dispute that the Protege's automatic shoulder belt satisfies this broad definition but, instead, contend that in addition the automatic belt must contain an integrated

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[4] Indeed, Plaintiffs concede that the Protege's restraint system "met the performance criteria of FMVSS crash tests." (Pls.' St. of Und. Mat. Facts at Par.2.)

[5] FMVSS 209 and its subsection are found at 49 C.F.R. § 571.209.

pelvic restraint pursuant under FMVSS 209 S4.1(b) and FMVSS 208 S4.5.3.4. FMVSS 209 S4.1(b) mandates that "a seat belt assembly shall provide pelvic restraint whether or not upper torso restraint is provided." Because the Protege's shoulder belt and knee bolster configuration does not afford pelvic restraint, were the Protege subject to FMVSS 209 S4.1(b), it could not be considered a seat belt assembly under FMVSS 209 S4.5.3 and, thus, would not conform to federal law.

The flaw in plaintiffs' argument, however, is that "automatic seat belts complying with FMVSS 208, with certain exceptions, are exempt from the requirements of FMVSS 209." *Montag v. Honda.* 75 f.3d 1414, 1418 (10th Cir. 1996), *cert. denied.* 117 S.Ct. 61, 136 L.Ed.2d 24 (1996). To reach that conclusion, a court must begin with S4.5.3.4, which provides that:

> An automatic belt furnished pursuant to S4.5.3 that is not required to meet the perpendicular frontal crash protection requirements of S5.1 shall conform to the webbing, attachment, hardware, and assembly performance requirements of Standard 209.

FMVSS 208 S4.5.3.4. "The implication of this regulation is that its inverse also applies: automatic seat belts which must meet the crash protection requirements of Standard 208 S5.1[6] are not required to conform to" FMVSS 209's requirements for webbing, attachment, hardware, and

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[6] FMVSS 208 S5.1 pertains to testing parameters for a frontal barrier crash test, in which a car traveling at speeds up to 30 m.p.h. is driven into a stationary barrier that has been placed perpendicular to the car's line of travel.

assembly performance. *Montag*, 75 f.3d at 1418. Plaintiffs argue that by its very language, S4.5.3.4 exempts only the Protege's webbing, attachment, hardware, and assembly performance from FMVSS 209. And, because pelvic restraint does not fall into any of these four exempted categories, plaintiffs assert that the Protege's belt configuration therefore fails to satisfy FMVSS S4.5.3.

However, S4.5.3.4 deals only with belts that are *not* required to meet S5.1. by meeting S5.1's frontal crash test, FMVSS 208 S4.5.3.4 does not apply to Protege's shoulder belt and knee bolsters. Thus, this Court agrees with the *Montag* court's reasoning that interpreting S4.5.3.4 to require automatic belts that satisfy S5.1 to also satisfy FMVSS 209 creates an internal inconsistency. Regulation FMVSS 209 addresses technical niceties for each component of a seat belt, and its subsection S4.1(b) specifically addresses pelvic restraint. Reading S4.5.3.4 to apply to the general condition of pelvic restraint under S4.1(b) but not requiring that it meet the specifics of FMVSS 209 is illogical.

The history of the provisions as well as NHTSA informal letters on the subject support the Court's interpretation. As plaintiffs point out, the original version of S4.5.3 provided that automatic belts must conform to the webbing, attachment hardware, and assembly performance requirements of FMVSS 209. S4.5.3 was amended, and S4.5.3.4 added, when a party requested that NHTSA exempt these parameters for automatic belts from FMVSS 209. The NHTSA accepted the argument that manufacturers should have the freedom to design an automatic belt system suited to the design of the vehicle and "decided that relief from Standard 209 should be afforded

if a passive belt is capable of meeting the occupant crash protection requirements of S5.1 in a frontal and perpendicular impact. . . . " Federal Motor Vehicle Safety Standards, 36 Fed. Reg. 23725 (1971). As a result, FMVSS 208 S4.5.3.4 was enacted. And, in two informal interpretive letters,[7] NHTSA, quoting the same sentence from its 1971 federal regulation that led to the passage of FMVSS 208 S4.5.3.4, explained that automatic belts complying with the crash protection requirements of FMVSS 208 are not subject to the requirements of FMVSS 209 S4.1(b). Defs.' Ex. A at 3 (Sept. 10, 1990 letter from NHTSA to private individual); defs.' Ex. B at 2 (June 5, 1992 letter from NHTSA to private individual). Further, the few federal courts to address this specific issue reached the same conclusion as does this Court. *See Montag*, 75 F.3d at 1418 (concluding that S4.5.3 automatic belts are not subject to FMVSS 209 requirements, specifically the S4.1(b) pelvic restraint requirement); *Brand v. Mazda Motor corp.*, 978 F. Supp. 1382, 1392 (D. Kan. 1997) (applying *Montag* and concluding that 1991 Mazda Protege's automatic shoulder belt qualified as automatic belt under S4.5.3, satisfied crash protection requirements of FMVSS 208 S5.1, and that standards of FMVSS 209 thus did not apply); *O'Bryan*

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[7] The agency's interpretation of its own regulations is entitled to substantial deference and should be given effect when the meaning of the regulations are unclear, unless that interpretation fails to " 'sensibly conform to the purpose and working of the regulation.' " *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.s. 144, 150-51, 111 S.Ct. 1171, 1175-76, 113 L.Ed.2d 117 (1991) (*quoting Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15, 96 S.Ct. 172, 173, 46 L.Ed.2d 156 (1975)).

v. Volkswagen of America, Inc., 838 F. Supp. 319, 322-23 (W.D. Ky. 1992) (concluding that S4.5.3 exempts FMVSS 208 S4.1.2.2 restraint system from FMVSS 209 S4.1(b) pelvic restraint requirement). Accordingly, the Protege's automatic restraint system qualifies as an automatic belt assembly under FMVSS 208 S4.5.3 despite the fact that it does not provide pelvic restraint.

b. Does S4.5.3 require an integrated Type 2 belt assembly?

Plaintiffs next argue that Mazda must provide a Type 2 seat belt assembly to comply with FMVSS 208 S4.5.3. A Type 2 assembly is defined in FMVSS 209 S3 as "a combination of pelvic and upper torso restraints." As plaintiffs point out, NHTSA has indicated that its "intent in adopting S4.5.3 was to permit manufacturers to substitute a Type 2 passive assembly with a detachable or nondetachable shoulder belt for any active seatbelt specified under an option of S4. . . . " Federal Motor Vehicle Safety Standards, 36 Fed. Reg. 23725. However, NHTSA stated more recently that an automatic belt under S4.5.3 must only satisfy the requirements found therein and does not have to qualify as a Type 2 seat belt assembly. Defs.' Ex. B. at 2 (June 5, 1992 letter from NHTSA to private individual).

FMVSS 208 S4.5.3 requires only that manufacturers install a "seat belt assembly." Given NHTSA's precision in specifying whether a particular type of assembly is required, had it intended manufacturers install a Type 2 assembly, it would have so stated in the provision. An overwhelming number of other provisions in FMVSS 208

state that a Type 2 seat belt assembly must be provided. *See. e.g.* FMVSS 208 S4.3.3.1 ("An automatic belt may not be used pursuant to S4.5.3 to meet the requirements of S4.1.5.1(a)(3) for a Type 2 seat belt assembly at any seating position equipped with an inflatable restraint . . . "); FMVSS 208 S4.1.4.2 (stating specifically that certain model vehicles "shall be equipped with a Type 2 seat belt assembly"). Clearly, NHTSA knew how to draft regulations requiring a Type 2 assembly, and the Court should not be eager to narrow a provision without substantial justification. As the court in *O'Bryan v. Volkswagen of America, Inc.* 838 F. Supp. 319, 322 (W.D. Ky. 1992), concluded "NHTSA has not required that an automatic belt substituted under S4.5.3 be an equivalent belt to the Type 1 or Type 2 seat belt it is replacing in either design or performance." *Id.* This Court agrees.

Moreover, even if S4.5.3 provided that automatic belts must meet the definition of a Type 2 seat belt assembly, the Protege's automatic shoulder belt and manual lap belt combination would most likely qualify. The type 2a shoulder belt, a subset of the Type 2 assembly, is defined as an "upper torso restraint for use only in conjunction with a lap belt as a Type 2 seat belt assembly." FMVSS 209 S3. As the definition itself reveals, when used in conjunction with a lap belt, a Type 2a belt assembly may be used "as a Type 2 seat belt assembly."[8]

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[8] Although the NHTSA's June 5 informal interpretive letter states that "an automatic shoulder belt is not a Type 2a belt," for purposes of S4.5.3, this conclusion is stated summarily and is based solely upon the NHTSA's position that S4.5.3 automatic belts do not have to qualify as Type 2 or Type 2a seat belt assemblies.

C. The Impact of Preemption on Plaintiffs' Claims.

As the Court earlier explained, under *Irving*, claims are preempted when based on allegations that the options provided in the standards are inherently defective designs. *Irving*, 136 f.3d at 768-69. Because the Court finds that the Protege's design satisfied federal requirements, plaintiffs' claims resting on design defect must fail. Additionally, plaintiffs' claim of negligent failure to warn is also preempted.

1. Design Defect Claim.

As discussed above, the undisputed evidence reveals that the Protege's restraint system complied with FMVSS 208 requirements. Plaintiffs do not allege that an alternatively designed automatic shoulder belt and manual lap belt system would have been without defect. Instead, in Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, Plaintiffs framed their design defect claim as follows:

> The Defendants failed to adequately design their passive seat belt system to provide sufficient pelvic restraint to prevent the lower torso of the occupant from submarining under the shoulder belt, creating a risk of severe injury in even low speed slightly offset frontal collisions.

Plaintiffs are clearly alleging that the restraint system defendants chose is inherently defective because an automatic shoulder belt and manual lap belt restraint system will never provide pelvic restraint automatically. No alternative designs of the automatic shoulder belt and manual lap belt system are offered by Plaintiffs but,

instead, they argue that Defendants should have utilized one of the other systems authorized by FMVSS 208. (Pls.' Br. in Opp. at 3.)

Therefore, "[b]ecause plaintiff[s] sued Defendants for exercising an option explicitly permitted by Congress," all claims that rely upon the defective nature of the restraint system for their validity are preempted by FMVSS 208 and must be dismissed. *Id.* at 769. To the extent that Plaintiffs' strict liability and negligence claims are based upon the defective design of the Protege's restraint system, they are dismissed. Furthermore, Plaintiffs' claims for breach of express warranty, breach of implied warranty, and breach of duty to notify of a defect are dismissed because they rely upon a finding that the Protege's system is defective as well.

2. Failure to Report and Recall.

Plaintiffs also claim that Defendants had a duty to report the dangerous nature of the Protege's restraint system and to issue a recall pursuant to 15 U.S.C. § 1411, recodified at 49 U.S.C. § 30116 (1997). Manufacturers only have a duty to report and recall equipment that is defective and not in compliance with applicable motor vehicle standards. *Id.* Because the Protege's system satisfies all applicable federal standards and is not defective, this claim is dismissed as well.

3. Failure to Warn Claims.

In *Irving*, Plaintiff's failure to warn claim was dismissed on preemption grounds as well because "Plaintiff . . . tied the claims of defective design and failure to warn together" by alleging that Defendants failed to warn of the restraint system's defective nature. *Id.* at 769. In the instant case, Plaintiffs' failure to warn claims sound in negligence and strict liability. The Court will thus address each theory of recovery in turn to determine whether they depend for their validity upon a finding that the Protege's restraint system is defective.

a. Strict Liability Claim.

To recover against a manufacturer in Georgia on any claim sounding in strict liability, a defect must have existed at the time the product was sold. *Hall v. Scott USA Ltd.* 198 Ga. App. 197, 200, 400 S.E.2d 700 (1990). Plaintiffs' strict liability claim for failure to warn is clearly tied to and dependent upon a finding that the Protege's restraint system is defective and is therefore preempted.

b. Negligent Failure to Warn Claim.

As the *Irving* court pointed out, negligent failure to warn claims are not normally dependent upon a defective design claim because proof of a design defect is not required for recovery. *Id. See Michael v. Norfolk Southern Ry. Co.*, 74 f.3d 271, 273 (11th Cir. 1996) (concluding that plaintiffs' negligent failure to warn claim was not preempted by federal regulations regarding product although plaintiffs' design defect claim was preempted). Instead, a plaintiff in Georgia may recover against a

manufacturer for negligent failure to warn upon a showing that the manufacturer failed to warn consumers of a foreseeable danger arising from the normal use of the product when that danger is not open or obvious to the consumer. *Sheckells v. AGV-USA Corp.*, 987 F.2d 1532, 1534 (11th Cir. 1993); Jean M. McIntosh, *Eldridge's Georgia Products Liability* § 2-24, at 48 (1987). However, with this claim too, preemption presents an insurmountable hurdle for plaintiffs. Plaintiffs do not allege that the Protege failed to comply with federal law requirements for warning label placement regarding proper seat belt use. In comparison, the negligent failure to warn claim in *Michael* was permitted to proceed because there remained the question of whether the challenged railroad crossing actually met federal regulations and whether the crossing was negligently maintained. *Michael*, 74 F.3d at 273. Because the claims of negligent design and negligent maintenance survived, the issue of whether the defendants adequately warned of these dangers also survived. *Id.* Here, however, plaintiffs argue that even though defendants were in federal compliance with required warnings, the warnings themselves inadequately communicated the dangers of driving without the manual lap belt engaged. Thus, under *Irving*, since defendants complied with federal requirements regarding warning labels, plaintiffs' claim is preempted.

III. CONCLUSION

For the aforementioned reasons, Defendants' Motion for summary Judgment [39-11] is **GRANTED** and Plaintiffs' Motion for Partial Summary Judgment [44-1] is **DENIED**. The Clerk of the Court is HEREBY ORDERED

to dismiss this case and terminate all pending submissions.

It is so ORDERED, this 12th day of February, 1999.

Willis B. Hunt, Jr.
Judge, United States District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8310-AA

DWAYNE JAMES,
JEWELL A. JAMES,
LOUISE KARTER,

Plaintiffs-Appellants,

versus

MAZDA MOTOR CORPORATION,
POPE CHEVROLET, INC.,
TOKAI RICA CO., LTD.,
JOHN DOE,
MAZDA MOTOR OF AMERICA, INC.

Defendants-appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion_____, 11th Cir., 19___, ___F.2d___).

Before: TJOFLAT, MARCUS and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on

rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

15 U.S.C. § 1392 (d) – *Supremacy of Federal standards: allowable higher standards for vehicles used by Federal or State governments* – Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1397 (k) – *Continuation of Common Law Liability* – Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. § 1411. *Notification respecting manufacturer's finding of defect or failure to comply* –

If a manufacturer –

(1) obtains knowledge that any motor vehicle or item of replacement equipment manufactured by him contains a defect and determines in good faith that such defect relates to motor vehicle safety; or

(2) determines in good faith that such vehicle or item of replacement equipment does not comply with an applicable Federal motor vehicle safety standard prescribed pursuant to section 1392 of this title; he shall furnish notification to the Secretary and to owners, purchasers, and dealers, in accordance with section 1413 of this title, and he shall remedy the defect or failure to comply in accordance with section 1414 of this title.

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49 C.F.R. § 571.208 S4.1.2.1 *First option – frontal/angular automatic protection system.* The vehicle shall:

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) *Either.* (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type

2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

49 C.F.R. § 573.5 – *Defect and noncompliance information report*

(a) Each manufacturer shall furnish a report to the NHTSA for each defect in his vehicles or in his items of original or replacement equipment that he or the Administrator determines to be related to motor vehicle safety, and for each noncompliance with a motor vehicle safety standard in such vehicles or items of equipment which either he or the administrator determines to exist.